UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ROGER BARBER, d/b/a	)	**DOCKET NO. CWA-05-2005-0004**
BARBER TRUCKING,	)	
	)	
RESPONDENT	)	

ORDER DENYING MOTION TO DISMISS

This civil administrative penalty proceeding arises under Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. part 22.

In its Complaint, the U.S. Environmental Protection Agency ("the EPA"), Region V ("the Region" or "Complainant") alleges that Roger Barber d/b/a Barber Trucking ("Respondent") violated Section 405(e) of the CWA, 33 U.S.C. § 1345(e), and 40 C.F.R. part 503, "Standards for the Use or Disposal of Sewage Sludge."

In an order dated December 7, 2005, I ruled on Complainant's Motion for Accelerated Decision on Liability, which was filed pursuant to 40 C.F.R. § 22.20. In that order, I explained that a motion for accelerated decision is akin to a motion for summary judgment, as the party filing the motion (i.e., the "movant") has the burden of showing that no genuine issue of material fact exists. Furthermore, I explained that in considering such a motion, I must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party, and that summary judgement on a matter is inappropriate when contradictory inferences may be drawn from the evidence. Moreover, I stated that even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial.

I granted accelerated decision in favor of the Complainant on Count I (failure to comply with the vector attraction requirements as mandated by 40 C.F.R. § 503.15(d)) and on the portion of Count II alleging failure to comply with the annual application rate pollution limits. However, I denied accelerated decision as to the portion of Count II alleging failure to develop, and retain for five years, information on the nitrogen requirement for the vegetation grown on the Site during a 365 day period, and I denied accelerated decision on Count III (failure to develop and maintain a certification statement required by 40 C.F.R. § 503.17(b)(6)), and Count IV (failure to develop and maintain a description of how the vector attraction reduction requirements are met).

Although I ruled against Complainant's motion for accelerated decision on Counts III and IV and part of Count II, I expressly took into account Respondent's *pro se* status. Furthermore, I pointed out that even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. Accordingly, I held that Complainant had not sustained its burden to prove that there was no genuine issue of material fact.

On January 10, 2006, Respondent submitted a Motion for Dismissal, which is simply a one sentence request for dismissal without any supporting argument:

> Respondent makes a motion as outlined in 40 C.F.R. 22.20 Code of Federal Re[g]ulations to request dismissal of ½ of Count II, Count III, and Count IV on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

Complainant's Response, submitted January 23, 2006, correctly notes that the Motion for Dismissal fails to point to any defect in the Complaint or any other "grounds which show no right to relief on the part of the complainant." Furthermore, the Complainant points out that Respondent's Motion for Dismissal fails to even specify on which "½ of Count II" the Respondent seeks dismissal, albeit it is logical to assume that Respondent seeks dismissal of that portion of Count II that was denied accelerated decision (i.e., failure to develop, and retain for five years, information on the nitrogen requirement for the vegetation grown on the Site).

The purpose of motions for dismissal and for accelerated decision is to allow the presiding judge to resolve a proceeding (or parts of a proceeding) without having to resort to an evidentiary hearing. *See* 40 C.F.R. § 22.20. The Rules of Practice, at 40 C.F.R. § 22.20, provide that the presiding judge, "upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he [or she] requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." As with a motion for accelerated decision, the burden to prove a motion for dismissal is on the movant. 40 C.F.R. § 22.16.

A motion to dismiss, under 40 C.F.R. § 22.20, is analogous to a motion for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure: "failure to state a claim upon which relief can be granted." *In re Tillion,* Docket No. CWA-10-2004-0067, at 5 (May 26, 2005). It is well established that "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the [complainant] can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *accord In re Tillion, supra,* at 5-6. For purposes of ruling on a motion for dismissal, in reviewing the sufficiency of the complaint the factual allegations made must be assumed to be true and all inferences must be drawn in favor of the complainant. *Tillion, supra,* at 6.

Accordingly, to prevail on its Motion to Dismiss, the Respondent must show that Complainant's allegations, assumed to be true, do not prove a violation of the Clean Water Act as charged. *Id.* Respondent has failed to do so. Instead, Respondent merely reiterates the language of the dismissal rule without providing any argument as to why this matter should be dismissed. The factual allegations in the Complaint support the CWA charges. As such, I conclude that the Respondent has not met its burden of proof on the Motion for Dismissal. Accordingly, Respondent's Motion for Dismissal is DENIED.

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Dated: February 16, 2006
Washington, D.C.

Barbara A. Gunning
Administrative Law Judge